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DEC 2 2 2004

No. 04-684

IN THE

Supreme Court of the United States

TEN TAXPAYER CITIZENS GROUP, ET AL.,

Petitioners,

v.

CAPE WIND ASSOCIATES, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD W. RENEHAN
Counsel of Record
GOULSTON & STORRS
A Professional Corporation
400 Atlantic Avenue
Boston, Massachusetts 02110
(617) 482-1776

Of Counsel:

TIMOTHY J. DACEY
KURT W. HAGUE
GOULSTON & STORRS
A Professional Corporation

Dated: December 22, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

CORPORATE DISCLOSURE STATEMENT

This Brief in Opposition is submitted on behalf of Cape Wind Associates, LLC ("Cape Wind"). Cape Wind has no parent corporation and no publicly traded company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the United States District Court dismissing the Petitioners' complaint is reported at Ten Taxpayers Citizen Group v. Cape Wind Associates, LLC, 278 F.Supp.2d 98 (D.Mass. 2003). The opinion of the Court of Appeals for the First Circuit affirming the District Court is reported at Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC, 373 F.3d 183 (1st Cir. 2004).

STATEMENT OF THE CASE

This case arises from the construction of a temporary test tower to collect scientific data pursuant to a permit issued by the U.S. Army Corps of Engineers in a section of Nantucket Sound over which the federal government exercises paramount jurisdiction. The Ten Taxpayer Citizens Group ("Ten Taxpayers"), Petitioners in this case, claim that erection of the test tower violated state law and that their challenge to the tower should have remained in state court. The District Court and the First Circuit disagreed on both counts.

The case has its genesis in the plans of Respondent Cape Wind Associates, LLC to build a wind farm consisting of 130 electricity-generating wind turbines on Horseshoe Shoals, an area of Nantucket Sound more than three miles from the mainland of Massachusetts and from the islands of Nantucket and Martha's Vineyard. To gather data about the winds and ocean currents in this portion of the Sound, Cape Wind applied to the Army Corps of Engineers for permission under the Rivers and Harbors Act, 33 U.S.C. § 401, and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(e), to erect a tower (referred to as a Scientific Measuring Devices Station

or "SMDS") on Horseshoe Shoals.[1] After soliciting public comment and holding two public hearings, the Corps of Engineers granted Cape Wind permission to build and maintain the SMDS for not more than five years.[2] The SMDS, which is now in operation, consists of a tower and various scientific instruments supported by three piles, occupying about 900 square feet of ocean.

In September 2002, before construction of the SMDS began, the Ten Taxpayers filed suit in Massachusetts Superior Court against Cape Wind and the Corps of Engineers and obtained an *ex parte* temporary restraining order. The federal defendants removed the case to the United States District Court for the District of Massachusetts. After the District Court denied the Ten Taxpayers' request for a preliminary injunction, the temporary restraining order expired by its terms and construction of the SMDS got underway.[3]

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[1] Cape Wind filed a separate application for permission to build the wind farm. That application is still pending before the Corps of Engineers, which has recently released a draft environmental impact statement for public comment. Information about the status of the wind farm application appears on the web site of the Corps of Engineers, New England District, at http://www.nae.usace.army.mil/projects/ma/ccwf/windfarm.htm.

[2] The Ten Taxpayers refer to the Corps' permit as a "navigability permit." Petition at 2. In fact, as required by its regulations, 33 C.F.R. § 320.4(a), the Corps performed an extensive public interest analysis that went far beyond issues of navigability. The Corps' Environmental Assessment and Statement of Findings can be found at http://www.nae.usace.army.mil/projects/ma/ccwt/ea.pdf. See also United States v. Alaska, 503 U.S. 569, 581-83 (1992), upholding the Corps' public interest regulations.

[3] Construction was completed in December 2002 and SMDS is now in operation. Real-time data from the SMDS can be found at http://capewind.whgrp.com.

The Ten Taxpayers then dismissed their first suit and brought the present action, again in state court, but this time omitting the federal defendants. In their new complaint, the Ten Taxpayers conceded that the proposed SMDS would be located in federal waters, but claimed that an amendment to the Magnuson-Stevens Fishery Conservation and Management Act ("Fishery Act") gave Massachusetts jurisdiction over all activities in Nantucket Sound, including those not directly related to fishing. They further alleged that Cape Wind had failed to obtain permits required by Massachusetts law, including the Massachusetts Ocean Sanctuaries Act. Cape Wind immediately removed the case to federal district court. The Ten Taxpayers moved to remand, but the District Court denied their motion without opinion.

Reaching the merits of the Ten Taxpayers' claims, the District Court held that the seabed of Nantucket Sound more than three miles from shore was an area of exclusive federal jurisdiction. 278 F.Supp.2d at 100. The Court rejected the Ten Taxpayers' argument that an amendment to the Fishery Act had transferred plenary jurisdiction over the seabed of the Sound from the federal to the state government. In the District Court's view, the delegation of authority "for purposes of [the Fishery Act]" did not give Massachusetts jurisdiction over structures like the SMDS that were unrelated to any fishing activity. 278 F.Supp.2d at 100-01. Accordingly, the District Court dismissed the complaint, and the Ten Taxpayers appealed.

On appeal, the Ten Taxpayers pressed their contention that removal of their case from state court was improper because no federal question appeared on the face of their complaint.[4] In response, Cape Wind advanced three grounds for federal question

[4] The Ten Taxpayers and Cape Wind are all citizens of Massachusetts, so no diversity existed.

jurisdiction: first, the Ten Taxpayers' claims depended on a grant of jurisdiction in a federal statute, the Fishery Act; second, the Ten Taxpayers' claims necessarily required resolution of a substantial federal question and thus there was jurisdiction under Smith v. Kansas City Title and Trust Co., 255 U.S. 180 (1921); and third, federal law completely preempted state law on the outer Continental Shelf. See Beneficial National Bank v. Anderson, 539 U.S. 1 (2003). The First Circuit rejected Cape Wind's first basis for federal jurisdiction, concluding that it was in essence a "federal preemption defense" and thus did not confer federal question jurisdiction. 373 F.3d at 191-92. The Court nevertheless upheld federal jurisdiction on the grounds that, under OCSLA, 43 U.S.C. § 1333(a)(2), any state laws applicable to the seabed of the outer Continental Shelf and to structures erected on the seabed are treated as surrogate federal law. The Ten Taxpayers' state law claims therefore arose under federal law. 373 F.3d at 192-93. Since it concluded that OCSLA provided a basis for federal question jurisdiction, the First Circuit did not reach Cape Wind's second and third grounds for upholding removal. 373 F.3d at 193, n.10.[5]

Turning to whether the District Court properly dismissed the Ten Taxpayers' complaint, the First Circuit held that the state statutes and regulations on which the Ten Taxpayers relied did not, by their terms, apply to the federal portion of Nantucket Sound. 373 F.3d at 194-95. Moreover, the First Circuit noted that the Massachusetts Department of Environmental Management, the agency that administers the Commonwealth's Ocean Sanctuaries Act, had expressly disclaimed authority over

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[5] Since the Court did not reach two of Cape Wind's three arguments, the Ten Taxpayers are plainly wrong when they assert at page 7 of the Petition that the First Circuit rejected all the grounds advanced by Cape Wind for removal jurisdiction.

Horseshoe Shoals. 373 F.3d at 195-96. (The letters disclaiming jurisdiction are reproduced in an appendix to this brief). Finally, the First Circuit held that, even if the state laws cited by the Ten Taxpayers did by their terms apply to Horseshoe Shoals, those statutes would be inconsistent with the federal government's exclusive power to manage and dispose of the resources of the outer Continental Shelf. 373 F.3d at 196-97. The First Circuit therefore affirmed the decision of the District Court. After the First Circuit denied their request for a rehearing *en banc*, the Ten Taxpayers filed the present Petition for Certiorari.

THE LAW GOVERNING NANTUCKET SOUND

As the Court of Appeals noted, the law governing Nantucket Sound is "complex and rather obscure." 373 F.3d at 187. We will, therefore, first address the legal framework within which the present dispute arises.

a. Regulation of the Seabed

In United States v. Maine, 420 U.S. 515 (1975), this Court held that the United States was entitled to exercise sovereign rights over the seabed and subsoil of the Atlantic ocean lying more than three miles from shore to the exclusion of the coastal states. In a later ruling arising from the same lawsuit, United States v. Maine, 475 U.S. 89 (1986), the Court rejected Massachusetts' attempt to establish an exception for Nantucket Sound and held that the Sound consisted partly of state waters and partly of federal waters. It is undisputed that Horseshoe Shoals, the site of the SMDS, lies in federal waters more than three miles off the coast of Massachusetts. The site is therefore part

of the outer Continental Shelf for purposes of OCSLA. 43 U.S.C. §§ 1331(a) and 1301.

OCSLA, which was enacted in 1953, declares that the subsoil and seabed of the outer Continental Shelf are subject to the jurisdiction, control, and power of disposition of the United States. 43 U.S.C. § 1332(1). The Act extends the Constitution and laws of the United States to the seabed and to structures erected on the seabed "to the same extent as if the outer Continental Shelf were an area of exclusive federal jurisdiction located within a state." 43 U.S.C. § 1333(a)(1). The Act also provides that, to the extent not inconsistent with federal law, the civil and criminal laws of adjacent states are declared to be the laws of the United States applicable to the seabed of the Shelf and to structures erected on the seabed. 43 U.S.C. § 1333(a)(2). Other provisions of OCSLA give the Secretary of Commerce authority to grant leases for the extraction of oil and mineral resources from the outer Continental Shelf, 43 U.S.C. §§ 1334, 1335, 1337, and grant the Coast Guard and the Secretary of the Army authority to regulate structures erected on the Shelf. 43 U.S.C. §§ 1333(d) and 1333(e).

Thus, in the area of Nantucket Sound where Cape Wind erected the SMDS, OCSLA grants the federal government exclusive authority to regulate the seabed and construction on the seabed.

b. Regulation of Fisheries.

In 1976, twenty-three years after the adoption of OCSLA, Congress enacted the Fishery Act to address serious declines in the fishing stocks in the ocean waters off the coast of the United States. The Fishery Act asserts "sovereign rights and exclusive fishery management authority" over fishery resources within

the "exclusive economic zone," an area that begins at the seaward boundary of state jurisdiction and extends 197 nautical miles out to sea. 16 U.S.C. § 1811(a); see also § 1802(11)(defining the exclusive economic zone). Within that area, the Fishery Act regulates who may fish, §§ 1821-24, by what means they may fish, §1821, and how much fish they may catch. §§ 1851-54. The Fishery Act also declared that Congress intended "to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources...." 16 U.S.C § 1801(c)(1).

There soon proved to be practical problems in administering the Fishery Act in pockets of federal waters surrounded by state waters. In 1983, Congress addressed these problems by adopting 16 U.S.C. § 1856(a)(2), added by Pub. L. 96-623 §403, 98 Stat. 3408, which provides in relevant part:

> For purposes of this chapter ... the jurisdiction and authority of a state shall extend-
>
> (A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States...;
>
> (B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian...; and
>
> (C) to the waters of Southeastern Alaska....

According to Representative Studds, one of the sponsors of the amendment, Nantucket Sound was included to ensure uniform fisheries management and fisheries law enforcement throughout the Sound. 128 Cong. Rec. 316585 (97th Cong.2d Sess.Dec.16, 1982).

In 1996, Congress again amended the Fishery Act, this time to provide additional protection for essential fish habitats, defined to include the "waters and substrate" necessary for fish spawning and growth. 16 U.S.C. § 1802(10), added by Pub.L. 104-297, § 102, 110 Stat. 3559. As amended, the Act now requires that the Fisheries Management Councils established by 16 U.S.C. § 1852(a) must, among their other duties, designate essential fish habitats for the species they manage, assess the effects of fishing practices on those habitats, and take steps to ameliorate adverse impacts caused by fishing. § 1853(a)(7). In addition, any federal agency that is contemplating action that might adversely affect an essential fish habitat must consult the Secretary of Commerce, who is required to make recommendations to mitigate the impact of the proposed action on the habitat. 16 U.S.C. §§ 1855(b)(2), 1855(b)(4).[6]

The Ten Taxpayers have seized on the 1983 and 1996 amendments to the Fishery Act as a basis to claim that state law now governs the seabed of Nantucket Sound. Reading these amendments together, the Ten Taxpayers claim that the Fishery Act

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[6] In this case, the requirements of the Fishery Act were followed to the letter. Before granting Cape Wind's application, the Corps of Engineers consulted the National Marine Fisheries Service, the agency that administers the essential fish habitat program. See 50 C.F.R. § 600.920. The Service advised the Corps that the SMDS would have only minimal impact on fish habitat, and it did not propose any conservation measures. The Corps concurred in the Services's assessment. See http://www.nae.usace.army.mil/projects/ma/ccwt/ea.pdf at pages 10-11.

gives Massachusetts jurisdiction over any construction on the "substrate" of Nantucket Sound, even if no fishing-related activity is involved. In effect, they contend that, as a result of these amendments to the Fishery Act, the provisions of OCSLA granting the federal government exclusive jurisdiction over the seabed of the outer Continental Shelf no longer apply in Nantucket Sound.

SUMMARY OF ARGUMENT

The Ten Taxpayers have failed to demonstrate a compelling reason for granting a writ of certiorari. The First Circuit's interpretation of OCSLA is consistent with the decisions of this Court and other federal courts, and is also consistent with the purposes of OCSLA as declared by Congress. The Ten Taxpayers are in substance arguing that the Fishery Act partially repealed OCSLA by implication, but such repeals are strongly disfavored, and the Ten Taxpayers have failed to address the criteria for implied repeal in their Petition. Finally, the First Circuit did not deprive Massachusetts of any opportunity to apply its own statutes. Massachusetts enforcement officials were notified of the Ten Taxpayers' claims but chose to take no action because they understood that the federal government had exclusive jurisdiction over Horseshoe Shoals.

ARGUMENT

I. THE FIRST CIRCUIT'S INTERPRETATION OF OCSLA IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS AND WITH THE PURPOSES OF OCSLA AS DECLARED BY CONGRESS.

In deciding that there was federal question jurisdiction, the First Circuit relied on 42 U.S.C. § 1333(a)(2), which provides in relevant part:

> "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws....*the civil and criminal laws of each adjacent state....are declared to be the laws of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon,* which would be within the area of the State if its boundaries were extended seaward to the outer margin of the of the outer Continental Shelf...." (emphasis supplied).

It is undisputed that Cape Wind's SMDS is a fixed structure erected on the seabed of the outer Continental Shelf. The First Circuit reasoned that, if Massachusetts laws apply to the SMDS at all, then § 1333(a)(2) declares that those laws are to be treated as surrogate federal laws. Thus the Ten Taxpayers' state law claims necessarily arise under the laws of the United States for purposes of federal question jurisdiction under 28 U.S.C. § 1332, and Cape Wind was entitled to remove these claims to federal court pursuant to 28 U.S.C. § 1441(b). 373 F.3d at 192-93.

The First Circuit's construction of § 1333(a)(2) is consistent with this Court's decision in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969). In that case, after reviewing the relevant language of OCSLA, the Court concluded that "[i]t is evident ... that federal law is 'exclusive' in its regulation of this area [the outer Continental Shelf], and that state law is adopted only as surrogate federal law." Id. at 357. Similarly, in Gulf Offshore Oil Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), this Court, construing § 1333(a)(2), stated that "[a]ll law applicable to the outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." Id. at 480.

Other federal courts have interpreted OCSLA in the same way. In Hufnagel v. Omega Serv. Indus., Inc., 182 F.3d 340 (5th Cir. 1999), a worker injured on a drilling platform attached to the outer Continental Shelf brought suit under a Louisiana statute in a Louisiana state court. The Fifth Circuit held that the defendants were entitled to remove the case to federal district court because, under 43 U.S.C. § 1333(a)(2), the Louisiana statute on which plaintiff relied became federal law when applied to an accident occurring on the outer Continental Shelf. 182 F.3d at 348-51. To the same effect, see Hodges v. Shell Oil Co., 1997 WL 473809, at 3-5 (E.D.La. Aug.19, 1997).

By recognizing that the law governing the outer Continental Shelf is exclusively federal, this Court and the other federal courts are carrying out the intent of Congress as manifested in OCSLA. In adopting OCSLA, Congress declared that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this

subchapter." 42 U.S.C. § 1332(1). Congress also declared that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public...." Consistent with these declarations of purpose, § 1333(a)(1) provides that the subsoil and seabed of the outer Continental Shelf shall be treated as "an area of exclusive federal jurisdiction within a State." See also § 1333(a)(3) (provisions adopting state law as federal law do not provide any state with a basis for claiming jurisdiction over the Shelf.) Thus, the adoption of state law as surrogate federal law is simply one aspect of OCSLA's program to assert exclusive federal control over the subsoil and seabed of the outer Continental Shelf. OCSLA leaves no room for state law to apply except as surrogate federal law.

The Ten Taxpayers, perhaps seizing on some of the language of this Court quoted above, argue that OCSLA adopts state law as surrogate federal law only if necessary to fill some gap not otherwise provided for by Congress. Petition at 7. Their argument confuses one of the purposes of § 1333(a)(2) with the means Congress chose. Under § 1333(a)(2), any state law applicable to the outer Continental Shelf becomes federal law, as long as it is not inconsistent with other federal law. In this case, the Ten Taxpayers claim that various Massachusetts statutes apply by their terms to the SMDS. Accepting their logic, OCSLA, as interpreted by this Court, requires that the Massachusetts statutes on which the Ten Taxpayers rely must be treated solely as surrogate federal law. There is no compelling reason to revisit this settled principle. The Ten Taxpayers' complaint was therefore properly removed to federal court.

II. THE TEN TAXPAYERS HAVE FAILED TO SHOW THAT THE FISHERY ACT IMPLIEDLY REPEALED THE PROVISIONS OF OCSLA GOVERNING THE SEABED OF NANTUCKET SOUND.

Although they scrupulously avoid using the term, the Ten Taxpayers in essence argue that the 1983 amendment to the Fishery Act dealing with pockets of federal waters, read together with the 1996 amendments concerning essential fish habitats, partially repeal OCSLA's program of exclusive federal control over the seabed of Nantucket Sound and the other pockets of federal waters described in 16 U.S.C. § 1856(a)(2). The Ten Taxpayers have failed, however, to satisfy or even to address the stringent criteria for finding an implied repeal of a federal statute.

The decisions of this Court have established that repeals by implication are strongly disfavored. See e.g., United States v. United Continental Tuna Corp., 425 U.S. 164, 168-69 (1976) and cases cited. To overcome the strong presumption against such repeal, there must either be an affirmative showing of an intention to repeal or a demonstration that the two statutes are irreconcilable. Morton v. Mancari, 417 U.S. 535, 549-50 (1974) cited with approval in J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 141-44 (2001).

There is nothing in the language or legislative history of the Fishery Act to indicate that Congress thought it was amending OCSLA. On the contrary, Congress declared that it intended to "maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources...." 16 U.S.C. § 1801(c)(1). When this language was adopted in 1976, the "ocean jurisdiction

of the United States" included jurisdiction over the subsoil and seabed of the outer Continental Shelf, as provided in OCSLA. Congress obviously thought that OCSLA and the Fishery Act could peacefully coexist.

Moreover, the construction of the Fishery Act advocated by the Ten Taxpayers is inconsistent with exclusive federal control of the resources of the outer Continental Shelf, one of the central purposes of OCSLA. If states like Massachusetts can require those seeking to develop the resources of the Shelf to obtain state as well as federal permits, the states can effectively exercise veto power over developments that the federal officials charged with administering OCSLA have approved. See 373 F.3d at 197. Indeed, one state law on which the Ten Taxpayers rely, the Massachusetts Ocean Sanctuaries Act, would prohibit most forms of development in the federal waters of Nantucket Sound. Mass. Gen. Laws, c. 132A, § 15. It is improbable that Congress would adopt such a fundamental change in OCSLA *sub silentio*.

The Ten Taxpayers claim that, under the Fishery Act, Massachusetts is entitled to exercise the same powers over essential fish habitat in Nantucket Sound that the Fishery Act grants to the Secretary of Commerce in 16 U.S.C. § 1855(b)(4), a provision which they describe as giving "legislative teeth" to the Act. Petition at 9. They ignore, however, the limitations that Congress placed on the Secretary's authority. The Fishery Act, as amended in 1996, requires a federal agency contemplating action that might affect an essential fish habitat to first consult the Secretary of Commerce. Id., § 1855(b)(2). The Secretary, in turn, is required to advise the agency with primary responsibility for the project about how best to conserve the affected fish habitats. Id., §

1855(b)(4).[7] However, once the consultation process has run its course, the Secretary has no power to prohibit the proposed project or to require the consulting agency to adopt the mitigating measures he suggested. Nothing in § 1855(b)(4) suggests that the Secretary of Commerce or Massachusetts officials standing in his shoes can prohibit construction that the Corps of Engineers has approved.

In fact, as the First Circuit correctly understood, OCSLA and the Fishery Act are complementary assertions of federal jurisdiction over different resources of the outer Continental Shelf. 373 F.2d at 197. In OCSLA, Congress asserted control over the subsoil and seabed of the outer Continental Shelf and to fixed structures erected on the Shelf. 43 U.S.C. §§ 1332(1), 1333(a)(1), 1333(a)(2). In the Fishery Act, Congress asserted fishery management authority over the fish that inhabit the Shelf. 16 U.S.C. § 1811. When it amended the Fishery Act to provide state control over pockets of federal waters, Congress gave states like Massachusetts the authority to regulate fishing-related activity in the affected waters, but Congress did not cede exclusive federal jurisdiction of the subsoil and seabed. Construed in this manner, the two statutes can, as the First Circuit observed, "readily co-exist." 373 F.3d at 197. The Ten Taxpayers have simply failed to cite any evidence of an irreconcilable conflict between OCSLA and the Fishery Act.

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[7] As indicated in footnote 6, above, the procedures mandated by § 1855(b)(2) and (4) were followed in this case.

III. MASSACHUSETTS HAD AMPLE OPPORTUNITY TO ENFORCE ITS OWN STATUTES, BUT CHOSE NOT TO, BECAUSE THE STATUTES DO NOT APPLY.

In their Petition, the Ten Taxpayers urge that review by this Court is warranted because Massachusetts has been deprived of an opportunity to "interpret the contours of its own laws." Petition at 6. In fact, the Massachusetts officials responsible for enforcing the statutes on which Petitioners rely were notified of the alleged violations but chose to take no action.

The Ten Taxpayers based their lawsuit on Mass. Gen. Laws c. 214, § 7A. That statute permits citizens to bring suit to restrain injury to the Massachusetts environment caused by violations of environmental protection laws, but only if the citizens first give notice of the violations to the officials responsible for enforcing the laws. In this case, the Ten Taxpayers gave notice to the Attorney General of Massachusetts, the Massachusetts Secretary of Environmental Affairs, the Commissioner of the Department of Environmental Management, the Commissioner of the Department of Environmental Protection, and the Commissioner of the Department of Fisheries, Wildlife and Environmental Law Enforcement.[8] None of these officials chose to take action against Cape Wind or to join in the Ten Taxpayers' lawsuit. One agency, the Department of Environmental Management, told the attorney for the Ten Taxpayers on two different occasions that jurisdiction over Horseshoe Shoals lies with the federal government. See Appendix at 1a-5a.

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[8] Copies of the letters to these officials and return receipts demonstrating delivery were attached to the Ten Taxpayers' complaint filed in the court below but are not reproduced in the Appendix to the Petition.

Massachusetts has not been deprived of an opportunity to construe its laws. Rather, the responsible Massachusetts officials decided not to enforce those laws against Cape Wind because they correctly concluded that the laws did not apply.

CONCLUSION

In an effort to find a friendlier forum for injunctive relief, the Ten Taxpayers brought an action in a Massachusetts state court based on state law, even though the work they sought to enjoin took place on the seabed of the outer Continental Shelf. The First Circuit concluded that, under OCSLA, the law applicable to the outer Continental Shelf is exclusively federal. That ruling is consistent with the plain language of OCSLA and with decisions of this Court. The Ten Taxpayers have failed to demonstrate any compelling reason to revisit this Court's interpretation of OCSLA and their Petition should accordingly be denied.

Respectfully submitted,

RICHARD W. RENEHAN
GOULSTON & STORRS
A Professional Corporation
400 Atlantic Avenue
Boston, Massachusetts 02110
(617) 482-1776

Counsel of Record for the Respondent Cape Wind Associates, LLC

Of Counsel:

TIMOTHY J. DACEY
KURT W. HAGUE
GOULSTON & STORRS
A Professional Corporation

APPENDIX

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

251 CAUSEWAY STREET, SUITE 600-700
BOSTON, MA 02114-2104
PHONE: 617-626-1250 FAX: 617-626-1449
www.state.ma.us/dem/

January 24, 2002

John W. Spillane
Spillane & Spillane LLP
23 Institute Road
Worcester, MA 01609

RE: EOEA file #12643, Army Corps file #199902477

Dear Mr. Spillane:

I am responding to your various letters regarding the proposed Windmill Farm in Nantucket Sound and, specifically, the applicability of the Ocean Sanctuaries Act to the proposed construction of a data gathering tower and associated measuring devices on Horseshoe Shoals. I refer specifically to your letter to me of December 27, 2001, your letter to Karen Kirk Adams of January 4, 2002, and your letter to Secretary Bob Durand of January 8, 2002.

In general, the seaward boundaries of the Ocean Sanctuaries follow the Exterior Line of the Commonwealth and are defined in MGL 132A §13 which you have referenced. While the original 1970's legislation establishing the sanctuary does state that

the Cape and Islands Ocean Sanctuary is intended to include Nantucket Sound, the United States Supreme Court, in 1986 (475 U.S. 89), decided that not all of the waters of Nantucket Sound are under the jurisdiction of the Commonwealth of Massachusetts, but are partly territorial sea and partly high seas. The official maps depicting the boundaries of the Sanctuary do not include the area known as Horseshoe Shoals, and jurisdiction over the central portion of the Sound, including Horseshoe Shoals, is with the federal government. The delineation of that area is partially shown on the map I sent to you on December 28, 2001. At that time I also sent the citation of the Supreme Court ruling referenced above.

That being said, it must be emphasized that the Department of Environmental Management maintains a direct interest in the proposed wind farm project inasmuch as trenching, cabling and other activities are proposed to occur in the Cape and Islands Ocean Sanctuary. Our oversight is governed by section 16, as well as sections 14, 15 and 18 of the Act. In accordance with the Department's obligations under the Act, we will fully study the proposal and pertinent permit applications, and we will submit appropriate comments to the relevant permitting agencies.

If you have any questions regarding the issue of jurisdiction of the Ocean Sanctuaries, I am available to discuss this matter with you in greater detail.

Sincerely,

Myron Gildesgame, Director
Office of Water Resources and
Massachusetts Ocean Sanctuaries Coordinator

cc: Bob Durand (MEPA)
Peter C. Webber, DEM.
Steve Tucker, CCC
Elizabeth Koulouheras
Jane Mad, CZM
Karen Kirk Adams, New England District, ACOE
U.S. Senator Edward M. Kennedy
U.S. Senator John F. Kerry
Congressman William Delahunt
Senator Robert O'Leary
Representative Demetrious Atsalis
Representative Thomas George
Town of Barnstable, Town Council
Town of Yarmouth, Board of Selectmen
Barnstable Conservation Commission
Yarmouth Conservation Commission
Massachusetts Aeronautics Commission
Rupert L. Nichols, President, MMTA c/o Spillane & Spillane

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

251 CAUSEWAY STREET, SUITE 600-700
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February 14, 2002

John W. Spillane
Spillane & Spillane LLP
23 Institute Road
Worcester, MA 01609

Subject: Horseshoe Shoals

Dear Mr. Spillane:

Thank you for your letter of January 31, 2002 and the copy of your February 1, 2002 letter to Karen Kirk Adams regarding your legal opinion of the Department's jurisdiction over Nantucket sound and in particular, over the area which includes Horseshoe Shoals.

While I appreciate your legal research and opinions regarding the U.S. Supreme Court's decision relative to state jurisdiction claims, the Department and the Ocean Sanctuaries Program have not claimed jurisdiction over the area of the sound which includes Horseshoe Shoals, and respectfully decline to seek to expand our current jurisdiction. This position is also in agreement with the position of the Cape Cod Commission which has also researched the project.

Please keep me advised of any further actions you may pursue in this matter.

Sincerely,

Myron Gildesgame, Director
Office of Water Resources and
Massachusetts Ocean Sanctuaries Coordinator

cc: Rupert L. Nichols, president MMTA c/o Spillane & Spillane
Bob Durand, EOEA
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